

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 GOOGLE INC., )  
4 Plaintiff, ) Case No. CV-09-642-HU  
5 vs. )  
6 TRAFFIC INFORMATION LLC, ) September 26, 2011  
7 Defendant. ) Portland, Oregon  
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14 **Oral Argument**

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE MICHAEL W. MOSMAN

17 UNITED STATES DISTRICT COURT JUDGE  
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1 (P R O C E E D I N G S)

2 THE CLERK: Your Honor, this is the time and place  
3 set for oral argument in Case No. 3:09-CV-642-HU, Google  
4 Inc. v. Traffic Information LLC.

5 Counsel, can you introduce yourself for the  
6 record.

7 MR. SHUNK: Your Honor, for plaintiff, my name is  
8 Tom Shunk. With me is my partner, Christina Moser, as well  
9 our local counsel, Ms. Julia Markley, from the Perkins Coie  
10 table. And also sitting at the table is Ms. Jennifer Polse  
11 from Google. She's corporate counsel for the company.

12 MR. SHLACHTER: Good afternoon, Your Honor.  
13 Robert Shlachter on behalf of Defendant Traffic.

14 MR. QUISENBERRY: Good afternoon. Dale  
15 Quisenberry on behalf of Defendant Traffic Information LLC.

16 THE COURT: Thank you all for being here and for  
17 your helpful briefing in this matter. I have reviewed with  
18 care Judge Hubel's F&R and your objections to it.

19 There are a couple of predicate matters. One  
20 appears to be unopposed, the addition of deposition  
21 testimony in the record.

22 Is there any objection to that?

23 MR. QUISENBERRY: No, Your Honor.

24 THE COURT: I will allow that to be added to the  
25 record.

1           The second is far more substantive, and that is  
2 Google's argument regarding indefiniteness. And I am  
3 declining to -- I think I was headed to a double negative  
4 there.

5           I am not going to raise any issues with the F&R  
6 because of indefiniteness. What I'm trying to say here is  
7 that I don't view that as a substantive objection to Judge  
8 Hubel's F&R; rather, an argument that should and can be  
9 still raised by way of dispositive motion.

10           The landscape is altered somewhat on that  
11 argument, also. In my own view, a phrase that is now not  
12 before me, "less than all available traffic information,"  
13 for example, raised the problem with indefiniteness, but I  
14 view it as less an objection to an F&R that is supposed to  
15 simply be claim construction, and more the seed of a future  
16 dispositive motion.

17           That leaves us with the still-pending-before-me  
18 claim construction terms that have been construed now by  
19 Judge Hubel. I'm prepared to go through those one by one,  
20 unless the parties have any other what I'll call predicate  
21 matters, starting with counsel for plaintiff.

22           MR. SHUNK: Your Honor, if I may, just so that I  
23 understand what Your Honor has told us, you don't need to  
24 hear argument today, then, with regard to the indefiniteness  
25 issue?

1 THE COURT: That's right.

2 MR. SHUNK: May we discuss that in the context of  
3 construing the claim?

4 THE COURT: Yes. What I want to do is claim  
5 construction, and invalidating the patent on indefiniteness  
6 is not what I intend to take up today.

7 MR. SHUNK: Thank you.

8 THE COURT: But the idea that indefiniteness, or  
9 an attempt to avoid it, or an argument that it can't be  
10 avoided, has something to do with claim construction, is an  
11 argument I'll hear.

12 MR. SHUNK: Thank you, Your Honor.

13 THE COURT: Anything further by way of predicate  
14 matters from the defense?

15 MR. QUISENBERRY: None, Your Honor.

16 THE COURT: All right. I'm trying to rank these  
17 in some rough order of importance. I may get their  
18 importance to the parties wrong, but if I can discern the  
19 weight of briefing, or maybe even the vehemence of briefing  
20 as a measure, then I believe we'll start with the term  
21 "traffic monitors."

22 So if you're me, you have before the Court three  
23 constructions: the Court's construction -- that is, Judge  
24 Hubel's construction; the proposal that Google makes -- and  
25 I'm not real concerned whether that's the same proposal that

1 was made to Judge Hubel or one that is made in response to  
2 Judge Hubel, I'm just treating these as the current proposal  
3 from Google; and the current proposal from Traffic.

4 Although they differ, for example, in their level  
5 of detail, the core difference is whether the traffic  
6 monitor is a stationary device or whether it's a device that  
7 can be, as Judge Hubel put it, mobile or fixed. What the  
8 device does after that, what it measures and does or what it  
9 measures seems to be something on which the parties and  
10 Judge Hubel are not very far apart, and the core of the  
11 argument seems to be the concept of whether it's mobile or  
12 fixed or simply stationary.

13 As I said, I'm familiar with your arguments, but  
14 I'd be happy to hear anything further you have, in addition  
15 to what you've written.

16 And I believe we'll start then with what I'll call  
17 the moving party here, although they're really cross  
18 definitions. I'll start with Google.

19 MR. SHUNK: Your Honor, Ms. Moser is going to  
20 address that. And if we may, we do have a few slides to  
21 assist in the presentation.

22 THE COURT: That's fine. As long as my machine  
23 works. It wasn't at an earlier hearing.

24 MS. MOSER: Your Honor, how would you like counsel  
25 to address the Court? Do you prefer us to stay seated?

1           THE COURT: You can stay seated if that works for  
2 you.

3           Last time this wasn't working, they told me my  
4 fingers were too cold.

5           MR. SHUNK: Your Honor, we do have printed copies  
6 as well.

7           THE COURT: I think that's the ultimate attempt to  
8 make it the user's fault.

9           Ms. Moser, is that it?

10          MS. MOSER: Yes.

11          THE COURT: Go ahead.

12          MS. MOSER: The primary difference between the  
13 parties, as you noted, is whether or not a traffic monitor  
14 is a stationary device, a so-called stationary device versus  
15 a mobile user station. And I think that it's important to  
16 note that there is some ambiguity that's introduced by the  
17 Finding & Recommendation's use of the term "mobile or  
18 fixed," because it concentrates on really the physical  
19 nature of the device rather than, as Google asserts, the way  
20 in which the device measures the -- either the traffic or  
21 the location of the user.

22          A traffic monitor throughout the patent is --  
23 there's no portion of the patent specification that  
24 indicates that a mobile user station is considered to be a  
25 traffic monitor or vice versa. In fact, the specification

1 quite clearly talks about the two different embodiments of  
2 the invention: one which specifies using the information  
3 for traffic monitors, and then the system may provide  
4 traffic information without the use of monitors at all,  
5 relying solely on information derived from the mobile user  
6 stations.

7 THE COURT: When you say that the patent  
8 specifications do that quite clearly, you mean on the one  
9 occasion that you've cited in your brief -- or, excuse me,  
10 that Traffic Information cites that you also cited, both of  
11 you, in your briefing, or are there several?

12 MS. MOSER: Well, there is that -- that is the  
13 clearest statement, and then if you go further in that same  
14 column, column 13, it talks about different advantages and  
15 disadvantages of using a traffic monitor versus a mobile  
16 user station: the cost, the advantages in terms of  
17 gathering information from a plurality of mobile users  
18 versus if a traffic monitor goes out, then there is a  
19 deficit of information for -- as to a whole section of road.

20 And also --

21 THE COURT: And just to back up also once, I want  
22 to make sure, even though it's hornbook law, I want to make  
23 sure we're speaking from the same page about sort of the  
24 hierarchy of sources for me to determine what the actual  
25 term we're talking about, the words "traffic monitors"



1 means.

2 So we're starting with the normal meaning to one  
3 skilled in the art of the phrase. Is it your contention  
4 that that is ambiguous?

5 MS. MOSER: What the meaning is to what --

6 THE COURT: Just to the words "traffic monitors."  
7 That's ambiguous, in your view, or not?

8 MS. MOSER: It's not necessarily ambiguous. I  
9 think that it's -- the meaning of "traffic monitor" is clear  
10 in the context of the patent, and --

11 THE COURT: So "in the context of the patent"  
12 meaning what parts of the patent make it clear to you?

13 MS. MOSER: The figures, and also the  
14 specification, in discussing the different -- the two  
15 different embodiments.

16 THE COURT: So the patent language, the claim  
17 language standing alone, in your view, does not make it  
18 clear; is that right?

19 MS. MOSER: Well, to the extent that it talks  
20 about gathering -- Claim 1, for example, talks about  
21 gathering information using traffic monitors, and then  
22 discusses the mobile user station as a separate device. It  
23 doesn't -- if a traffic monitor was a mobile user station,  
24 then there would be really no point in choosing this  
25 particular analysis.

1 THE COURT: So it's at least inferable, in your  
2 view, from just the claim language that, at a minimum,  
3 traffic monitors are not the same thing as mobile user  
4 stations?

5 MS. MOSER: Yes, Your Honor.

6 THE COURT: And since mobile user stations have a  
7 lot in common with traffic monitors, except the word  
8 "mobile," you think that's the inferable difference between  
9 the two; that one is mobile and one is not?

10 MS. MOSER: Not just purely based on the claim  
11 language, Your Honor, but looking at --

12 THE COURT: Well, I understand that, but I want to  
13 know whether you get that far just by claim language.

14 MS. MOSER: If one is to give significance to the  
15 use of the word "mobile" in "mobile user station," then yes.

16 THE COURT: All right. And then the next source  
17 you want to turn to are the embodiments, the pictures and  
18 the specifications?

19 MS. MOSER: Yes, Your Honor.

20 THE COURT: All right. What are you going to  
21 start with? The specification language?

22 MS. MOSER: As we have pointed out in our brief,  
23 the specification language, column 13 in particular, but  
24 also in general discussing the two different embodiments,  
25 the one where the information is provided by the local user

1 station versus where it's provided by the traffic monitors,  
2 and in the descriptions of traffic monitors being devices  
3 which, as the exhibits to the proposed reply brief, the  
4 traffic detector handbooks, they look at the video cameras,  
5 the infrared cameras, the radar cameras, the strips. This  
6 is -- in figure 2 of the patent shows an exemplar of the  
7 traffic monitor and discusses -- and the 22B is the strip  
8 that can be buried in the roadbed. 22A is the microwave  
9 detector infrared device that measures the traffic. And  
10 when looked at also in context of figure 1, it shows the  
11 fixed location of each traffic monitor, 22X, versus, you  
12 know, the mobile user station, which is depicted as in the  
13 vehicle.

14 THE COURT: All right.

15 MS. MOSER: So the discussions of traffic monitors  
16 clearly relate to devices that measure the speed of  
17 vehicles, the flow of traffic as it passes by the monitor,  
18 and the descriptions of traffic monitors also repeatedly  
19 refer to measuring traffic as it passes by, and describes  
20 and shows the traffic monitors themselves located at fixed  
21 intervals along the roads, specifically figures 1, 7 and  
22 8 -- or 1, 7 and 11, and then in columns 5, 6, 7, 13, 15,  
23 16.

24 So those discussions, in talking about how -- and  
25 this is the point that we're trying to make, that -- where

1 we think some clarification of the judge's order is in  
2 order, because it's not necessarily, you know, how the  
3 device is affixed, whether it can be bolted to a -- an  
4 overpass, whether it can be placed on a road at one point,  
5 such as with traffic construction, the devices that measure  
6 the speed of cars in traffic construction zones that are  
7 then movable to another location. What constitutes easily  
8 movable? If we jump ahead and also look at "traffic  
9 monitor" in the context of the magistrate judge's definition  
10 of "mobile user station," what is easily movable? That --  
11 really the physical fixed or unfixed nature of the device  
12 isn't relevant to the patent. What is relevant is how it  
13 measures the information.

14 THE COURT: From a stationary position versus a  
15 mobile?

16 MS. MOSER: Correct, Your Honor.

17 THE COURT: So you can take a device, and as long  
18 as you -- when measuring for traffic data, it's stationary,  
19 and in your view that's a traffic monitor?

20 MS. MOSER: Because you're measuring the vehicles  
21 as they pass. You're measuring the flow, the density of  
22 traffic. And that is -- that's the primary difference in  
23 how the two are described.

24 THE COURT: What you seek to exclude from "traffic  
25 monitors" is a device that can determine speed, frequency

1 and the like from traffic from a mobile position?

2 MS. MOSER: Yes, Your Honor. And also the --

3 THE COURT: And I don't mean to say that's what  
4 you seek to exclude, because what you want isn't really what  
5 we're after here, but rather you contend that that is the  
6 linguistic difference between a traffic monitor and a mobile  
7 user station?

8 MS. MOSER: Yes --

9 THE COURT: It's the mobility of the device as  
10 it's measuring?

11 MS. MOSER: That's what the patent teaches. And  
12 to the extent that Traffic wishes to argue at a later date  
13 that, you know, a mobile device serves substantially the  
14 same function in substantially the same way to achieve the  
15 same result, then they're free to argue that, and the  
16 parties can dispute whether the doctrine of equivalents is  
17 available in that context, dealing with infringement.

18 But the claim construction process is not the time  
19 to look at -- as the magistrate judge held, he said the two  
20 devices can perform the same function, and that, in and of  
21 itself, that's one of the factors looked at under doctrine  
22 of equivalents. So Google asserts it's not appropriate to  
23 judge at the claim construction stage one of the elements of  
24 whether or not a mobile device qualifies as a traffic  
25 monitor under the doctrine of equivalents.

1 THE COURT: So you don't think the doctrine of  
2 equivalents is a doctrine to aid in claim construction; that  
3 is, that it's to be avoided if possible in claim  
4 construction?

5 MS. MOSER: Absolutely, Your Honor.

6 THE COURT: You agree that it's not an element of  
7 claim construction?

8 MS. MOSER: Correct.

9 THE COURT: Or a tool, I should say.

10 MS. MOSER: Correct. The doctrine of equivalents  
11 has no place in claim construction, and the *AquaTex*  
12 decision, I think, addresses that, because in that case  
13 there was a question as to whether the fiberfill was  
14 supposed to be natural or whether synthetic could also be  
15 included within the scope of the patent claims, and the  
16 Court clearly said, "Well, look, it might not make a  
17 difference ultimately as to infringement, but the  
18 specification, the patent teaches only the natural fibers.  
19 If the other party wants to argue that its fibers are  
20 included, then that's a doctrine of equivalents argument for  
21 a later date."

22 THE COURT: You're aware your opponent's main  
23 argument is that you have cherrypicked from the embodiments  
24 in order to propose language that limits the claims? I'm a  
25 rookie, but I know enough about patent law that I know that

1 I'm supposed to fall down in shock when that happens. It's  
2 a cardinal sin.

3 MS. MOSER: Yes.

4 THE COURT: Not ordinal, cardinal.

5 MS. MOSER: Yes, yes.

6 THE COURT: It takes confession and quite a bit of  
7 other penance if you actually do that.

8 So what's your response to that argument that  
9 you've taken embodiments here and said, "Well, they look  
10 stationary on the pictures, so 'traffic monitor' must mean  
11 stationary"?

12 MS. MOSER: And, Your Honor, the cardinal sin of  
13 claim construction, that's easy enough to repeat, but in  
14 looking at, you know, how the courts actually apply these  
15 principles, *Phillips* itself says that you need to look at  
16 the claim language in the context of the specification. You  
17 have to do that.

18 And the *ICU* case, the *ICU Medical* case that I was  
19 referring to earlier, the -- even if some of the language  
20 might be broad, you still have to look at how it's described  
21 in the specification. The reference to *Phillips*, it's not a  
22 panacea.

23 And in this particular case, it's particularly  
24 relevant that even Traffic admits that there are -- that the  
25 patent claims different embodiments. Claim 1 uses traffic

1 monitors. Claim 21, on the other hand, doesn't incorporate  
2 traffic monitors explicitly in the claims of the patent.  
3 And that follows along with how the specification describes  
4 the alternative embodiments.

5 The cases in our brief cite to the fact that  
6 different claims can claim alternative embodiments, and that  
7 the patent should be interpreted accordingly.

8 THE COURT: The last question before I turn to  
9 Traffic. I confess I sort of lost my way here regarding a  
10 principle that I usually find very important, and that's  
11 burden of proof. But we have a patent that's presumed  
12 valid. There's language in the claims to be construed in a  
13 Markman hearing. That's happened with the magistrate judge  
14 in Traffic's favor on this issue, although he queried  
15 whether mobile or fixed does that very accurately, but at  
16 least Judge Hubel seems to reject the concept that  
17 stationary is the right definition.

18 Whose burden are we -- who's got the burden now?  
19 Any thoughts on that?

20 MS. MOSER: I would say it's de novo review, Your  
21 Honor, and so you'd go back and refer to the original burden  
22 on claim construction, where both parties have --

23 THE COURT: Equal burden?

24 MS. MOSER: Yes, right. And it's a matter of law,  
25 as with contractual interpretation.



1 THE COURT: Thank you.

2 All right. Again, we're trying to focus in on the  
3 concept of stationary or not as a way to define traffic  
4 monitors. What are your thoughts?

5 MR. QUISENBERRY: May I bring up a copy of my  
6 PowerPoint?

7 THE COURT: You can. It won't -- well, actually,  
8 yes, you can. Here, it appears Ms. Stephens has fixed it.  
9 I'm not supposed to look surprised. It's up.

10 MR. QUISENBERRY: Let me first just address this  
11 last point. I believe I heard Ms. Moser say that Traffic  
12 has admitted that there are different claims directed to  
13 different embodiments, with one claim directed only to  
14 traffic monitors, another claim directed only to mobile user  
15 stations.

16 I'm not sure that we have admitted that anywhere.  
17 But the point that I would make, and I think the argument  
18 that we made in our briefing is that what they're not  
19 keeping in mind is that when you add in Claim 22 to Claim  
20 21, which Claim 21 is the independent claim that has the  
21 "mobile user station" in it but it doesn't have "traffic  
22 monitor," when you add in Claim 22, it further recites  
23 "traffic monitor."

24 So, you know, when you're -- at least when you're  
25 considering Claim 22, that's when it addresses a traffic

1 monitor.

2 So let me go to the section in here that has to do  
3 with my comments on the stationary. Okay. It starts right  
4 here.

5 So the Court has already granted me in this  
6 argument that they're just importing limitations from the --

7 THE COURT: I haven't granted you -- I've granted  
8 you that it's your argument, but that doesn't help you much.

9 MR. QUISENBERRY: I didn't mean to suggest that  
10 you had adopted it.

11 But so if you look at --

12 THE COURT: If I could interrupt you for just a  
13 moment. It does appear to me, first of all, that both sides  
14 have at least implicitly determined that the question isn't  
15 answerable from the term itself. It's not the sort of term  
16 that one reasonably skilled in the art would know how to  
17 define with regard to the debate that is present between  
18 these two parties. So that means that you may agree on what  
19 "traffic" is, for example, or not, but whether this means  
20 stationary or not stationary isn't readily answerable from  
21 the words "traffic monitors" or other language from the  
22 claims.

23 Do you agree with that, that you have to turn to  
24 some other source in order to decide this particular debate  
25 about the meaning of the phrase?

1 MR. QUISENBERRY: Well, I guess the first point I  
2 would say is that I think that you can look at this claim  
3 and see very clearly that it doesn't require that they're  
4 stationary, and that had that been the intent, it could have  
5 easily been done, but it wasn't.

6 So we think that's an important point, that the  
7 claim language itself does not include the limitation  
8 "stationary."

9 THE COURT: Why is that important? That's an  
10 argument I think that you could probably make in every  
11 Markman hearing where the phrase doesn't readily have an  
12 answer to the question. You can always say, "Well, it  
13 doesn't say what my opponent thinks it needs to say," and I  
14 guess your opponent could say, "Well, it doesn't rule out  
15 the meaning that we contend it has." I mean, don't those  
16 two arguments just kind of cancel each other out?

17 MR. QUISENBERRY: Well, I'm not so sure that they  
18 do when you look at the whole context of the intrinsic  
19 record here. And I understand you're asking me whether we  
20 need to go outside the claim. I think you do need to go  
21 look at the specification. I think it's very difficult to  
22 construe the claims without doing that.

23 THE COURT: All right. So your argument on the  
24 claim language itself is that it doesn't ever make clear  
25 anywhere in the claim language that they are stationary. So

1 you say that's sort of the dog that doesn't bark. It's not  
2 in there, so I shouldn't find it.

3 MR. QUISENBERRY: Unless there's some reason in  
4 the specification that says that "traffic monitor" should  
5 mean something that it's limited to, just something that's  
6 stationary. And there's nothing in the specification that  
7 requires that. I think that's a key difference between the  
8 case law that they have given to us. I mean, some of those  
9 cases have to do with there was a -- there was a particular  
10 limitation that was added, or where the patent stated that  
11 they were trying to overcome a problem with the prior art,  
12 and in order to do that, they went with the parallel bus or  
13 whatever that case was.

14 There's nothing in this patent that says there's a  
15 problem with stationary traffic monitors, or there's a  
16 problem with mobile traffic monitors, therefore we have to  
17 go with stationary.

18 THE COURT: All right. So your opponent's central  
19 argument textually is this idea that mobile user stations  
20 and traffic monitors are treated differently in various  
21 places, including in the specification language, but in  
22 various places, and that there are a number of inferences  
23 that seem to be readily drawn from that idea, meaning that  
24 there are two different concepts, mobile user station and  
25 traffic monitor, focusing on the word "mobile" here.

1           The argument I've heard advanced in your briefing  
2     is that that's an unfair selection of language only from  
3     embodiments. Is that your core argument to say that I  
4     shouldn't make much of a distinction in the patent between  
5     traffic monitors and mobile user stations?

6           MR. QUISENBERRY: Absent some reason in the  
7     specification that says that that distinction requires  
8     traffic monitors being limited to stationary, it's just not  
9     there.

10          THE COURT: Thank you.

11          MR. QUISENBERRY: Can I just go ahead and flip  
12     through these slides here and just make sure I didn't miss  
13     anything?

14          THE COURT: No.

15          "Traffic monitors" is a term that you have  
16     proposed construing in a certain way, and Judge Hubel  
17     essentially went your way, with some differences.

18          What are your -- assuming that you win the day on  
19     the concept of "stationary," what are your quibbles with  
20     Judge Hubel's definition? Why would you prefer your own?

21          MR. QUISENBERRY: May I refer to the slides for  
22     this?

23          THE COURT: Yes.

24          MR. QUISENBERRY: Okay. So looking here, this is  
25     the magistrate judge's claim construction. Do you have

1 that, Your Honor?

2 THE COURT: Yes.

3 MR. QUISENBERRY: So we've got this first  
4 occurrence of "and" here. And in essence, it appears that  
5 what the magistrate judge has required is that the traffic  
6 monitor must be able to do all four of these  
7 things: measure, detect, determine and transmit.

8 So our proposed fix to that is that it be changed  
9 to "and/or."

10 And if you look, for example, at Claim 1 of the  
11 '862 patent, it only recites that it should be able to do  
12 two of them, detect and transmit.

13 Here's a copy of Claim 1, and if you look here --

14 THE COURT: That's fine. I don't think that's a  
15 live debate between the parties. Google's proposal uses the  
16 disjunctive in a similar spot.

17 What else do you care about with Judge Hubel's  
18 definition?

19 MR. QUISENBERRY: Well, we certainly care about  
20 that one, and we care about the same issue here, the second  
21 occurrence of "and." It has the same issue of essentially  
22 requiring that the traffic monitor do all four of these  
23 things with respect to speed, average speed, position on the  
24 road, direction of travel, and frequency of travel in  
25 seconds or minutes.

1           And the specification I believe clearly shows that  
2     those things are -- they're options, they're examples, but  
3     they're not requirements.

4           Here's an example at the bottom here, where it  
5     says, "Traffic monitors may detect or otherwise calculate  
6     speed, average speed, traffic flow, or other data  
7     representative of the traffic."

8           THE COURT: Is there anything that Judge Hubel's  
9     definition of "traffic monitors" does that in your view is  
10    different than your own proposal of the definition of  
11    "traffic monitors" if you had the disjunctive throughout in  
12    his definition?

13          MR. QUISENBERRY: If we add in "and/or"?

14          THE COURT: Yes.

15          MR. QUISENBERRY: The only other two things -- the  
16    other item would be where it talks about multiple vehicles,  
17    right here.

18          THE COURT: As opposed to a singular or a  
19    multiple? That's your quibble?

20          MR. QUISENBERRY: What we proposed was to strike  
21    "multiple" and put "one or more" there.

22          Let me just get down here and just make these  
23    points.

24          THE COURT: You don't need to do that. If I need  
25    you to just go through your whole slide and make sure you

1 haven't missed something, I'll let you know.

2 MR. QUISENBERRY: Fair enough.

3 THE COURT: All right. Thank you.

4 Do you wish to reply on this issue?

5 MS. MOSER: Yes, Your Honor. There are a couple  
6 of points of clarification that I'd like to make, to sort of  
7 go backwards in time.

8 The first one addresses Google's proposed  
9 construction of "traffic monitor," and the disjunctive that  
10 Google has in its definition refers to the type of  
11 information, the speed, frequency or flow of multiple  
12 vehicles. That was our proposal.

13 But with respect to --

14 THE COURT: I took that to mean you didn't believe  
15 that the phrase should be construed to require all instead  
16 of one or more of those pieces of data.

17 MS. MOSER: Well, the specific portion of the  
18 magistrate's construction that Traffic is focusing on, I  
19 think, has to do with the various functions. So it's the  
20 measuring, detecting, determining and transmitting. And on  
21 that, Google does take issue with Traffic's proposed  
22 insertion of "and/or" between those different functions,  
23 mainly because --

24 THE COURT: What's the difference between  
25 measuring, detecting and determining versus determining?



1 MS. MOSER: Your Honor, with -- you know, in our  
2 estimation, there's probably not much difference.

3 THE COURT: Well, then why does it matter if they  
4 have to do all of them or one or more? Your word is  
5 "determining."

6 MS. MOSER: Well, because it has to transmit as  
7 well. The traffic monitor in the claim specifications  
8 includes transmitter, and it has to transmit the information  
9 to the computer system in order for the entire system to  
10 work.

11 THE COURT: Traffic's proposal says, "a device  
12 used to sense, measure, detect and/or determine."

13 You say "determine." In my own view, those are  
14 meaningless distinctions, but we'll go back if we have to,  
15 "and to transmit."

16 So you're saying that I should be careful to make  
17 sure that they have to determine and transmit?

18 MS. MOSER: Yes, Your Honor.

19 THE COURT: And isn't that what Traffic's proposal  
20 does, determine and transmit?

21 MS. MOSER: Well, no, because the "and/or" allows  
22 it to transmit.

23 THE COURT: And/or provide?

24 What's the difference between "transmit and/or  
25 provide"?

1 MS. MOSER: Providing and transmitting, Your  
2 Honor, I'm not --

3 THE COURT: They either transmit it or someone  
4 writes it out and walks over to the end user and hands them  
5 a note, I guess. I don't like to make too much of  
6 distinctions that are really just unnecessary verbiage.

7 MS. MOSER: Well, with their proposed revision,  
8 though, the device can just transmit or it can just measure.

9 THE COURT: Their proposed revision to Judge  
10 Hubel's --

11 MS. MOSER: Correct, correct. And we think that  
12 writes out an express limitation to the claim.

13 THE COURT: Don't you agree that the device has to  
14 determine and transmit?

15 MR. QUISENBERRY: No.

16 THE COURT: You say it can just determine and not  
17 transmit it via traffic monitor under the claim language?

18 MR. QUISENBERRY: Well, what I would say is that  
19 you're looking for a minimum of two things that it has to  
20 do. I would say based on the claim language, it has to  
21 detect and transmit. That's what the --

22 THE COURT: So not determine and transmit, but  
23 detect and transmit?

24 MR. QUISENBERRY: Well, I think Your  
25 Honor raises --

1           THE COURT: It has to do something and transmit,  
2           though?

3           MR. QUISENBERRY: I believe that the claim  
4           language says that it would be detect and transmit.

5           THE COURT: Well, my question was it has to do  
6           something and transmit. And you agree with that, don't you?

7           MR. QUISENBERRY: I do.

8           THE COURT: So in terms of "and/or transmit," you  
9           agree that that should just be "and"? Whatever may come  
10          before that, we'll talk about, but it has to transmit?

11          MR. QUISENBERRY: I agree that it has to transmit.

12          THE COURT: Thank you.

13          Let's turn to "mobile user station."

14          Actually, since we're doing this a little bit like  
15          Russian dolls here, my own view, having reviewed the  
16          pleadings and done my best so far on these fairly specific  
17          issues, is that the phrase "traffic monitors" does not  
18          necessarily include within it in anything other than perhaps  
19          some preferred embodiments the concept of being stationary.  
20          And I decline to read into "traffic monitors" the need to be  
21          stationary from really just those preferred embodiments.

22          I agree that there is -- that there are two  
23          devices talked about, not just in the embodiments but  
24          elsewhere, and those are mobile user stations and traffic  
25          monitors, but I decline to infer from the presence of those

1 two devices being described a further concept, which is that  
2 the traffic monitors must be stationary.

3 I agree with Traffic's concerns about the  
4 Court's -- that is, Judge Hubel's earlier construction that  
5 "mobile" or "fixed" -- I should say Google's concern also  
6 that "mobile" or "fixed" isn't quite the right way to phrase  
7 that. And I am concerned about the final sentence of Judge  
8 Hubel's construction, which I'm not sure ends up being  
9 clarifying of the term language as opposed to accomplishing  
10 something else.

11 So those are my rulings. My tentative intention,  
12 which I will revisit after I've heard all the arguments on  
13 all of the claims, is essentially to adopt Traffic's  
14 proposal, not the F&R's proposal for the definition of  
15 "traffic monitors." It's a shorter definition.

16 And just to be clear, I understand that to be even  
17 today the following: "Any device used to sense, measure,  
18 detect and/or determine vehicular movement and transmit  
19 and/or provide a signal representative of vehicular  
20 movement."

21 I say tentative because I've already expressed in  
22 my view the idea that that contains a number of phrases that  
23 if it were presented to me by a law clerk, I would edit out  
24 as pointless, but the core concept is a device that  
25 determines vehicular movement and transmits it, is what I

1 intend to adopt here.

2 I don't know what you gain by "transmit and/or  
3 provide." Is there any iteration of this device on Earth  
4 that will hand over the determined information in any other  
5 way than by transmitting it?

6 MR. QUISENBERRY: We have, Your Honor, no  
7 objection here if you would like us to strike "and/or  
8 provide," no objection here.

9 THE COURT: Okay.

10 MR. QUISENBERRY: Could I say one other thing?

11 THE COURT: Yes.

12 MR. QUISENBERRY: What I just heard Your Honor say  
13 is that the core was "determine and transmit," and that's  
14 different than what we proposed. And if you're going to go  
15 with just two things, I would much prefer it be "detect and  
16 transmit," just because that's what the claim language says.

17 THE COURT: Well, just so you know, the proposal  
18 you made is, "Any device used to sense, measure, detect  
19 and/or determine," which means that it can be read in four  
20 different ways. Any device that determines and transmits.  
21 And you contend that detecting is different than  
22 determining?

23 MR. QUISENBERRY: Well, I think it begs the  
24 question, but --

25 THE COURT: You'd like all of it, in other words,

1 but if you had to pick one, it would be "detect"?

2 MR. QUISENBERRY: Yes.

3 Now, what --

4 THE COURT: Thank you.

5 Let's turn to "mobile user station." The core  
6 distinction here is that it's distinct from a traffic  
7 monitor, on the one hand, and I assume also that it's mobile  
8 as opposed to stationary or not easily movable.

9 I have, by defining "traffic monitors" the way I  
10 have, answered the question of whether the distinction is --  
11 well, whether mobile user stations can fall within sort of a  
12 subset of traffic monitor or not.

13 We're left with Google's concern that the mobile  
14 device ought to be defined as distinct from a traffic  
15 monitor, and after that I'm not sure there is much dispute.

16 There is a difference, I understand, between  
17 "mobile" and "easily movable," at least you've raised that  
18 earlier, that a number of things that are easily movable are  
19 not mobile, and that has to do with not how they're placed  
20 on Earth but rather how they measure incoming data; is that  
21 right?

22 MS. MOSER: Yes, Your Honor.

23 THE COURT: So if I understand Google's proposal  
24 here, you'd want "mobile user stations" to be defined as a  
25 mobile device, and that's the crux of the matter for you,

1     that they have to be -- does just saying they're a mobile  
2     device, does that get at the concept you've raised earlier,  
3     that they -- that they detect or determine incoming data  
4     while they're mobile, as opposed to simply being easily  
5     movable?

6             MS. MOSER: Yes, Your Honor, I think so, because  
7     the mobile device, the point of the mobile user station is  
8     that they detect. They don't necessarily detect the traffic  
9     information, vehicular movement, they detect the mobile user  
10    location, as described in the patent at various points. So  
11    that's -- it's measuring while it's mobile. That's the  
12    whole point of incorporating the mobile user stations into  
13    the system.

14            THE COURT: So am I right that given what I've  
15    done with "traffic monitors" already, the core of the  
16    dispute now is whether a mobile user station is a mobile  
17    device or an easily movable device? Because your concern is  
18    that traffic monitor can be both stationary and -- well, it  
19    can be both stationary and easily movable?

20            MS. MOSER: To be honest, Your Honor, I don't  
21    think "easily movable" adds anything to the patent. I don't  
22    think that it serves -- it relates to the purpose of the  
23    invention or adds really any meaningful distinction. Like  
24    you said, "easily movable" can -- it's sort of relative  
25    versus how the two devices are meant to measure. One is

1 meant to be -- you know, measure traffic, measure vehicles  
2 as they pass by. They're meant to measure actual vehicular  
3 movement traffic, as a body, as a whole.

4 The mobile user station's purpose is to measure  
5 the location of the user essentially, the mobile user  
6 station. So that's one vehicle, the movement of one vehicle  
7 through the road system.

8 THE COURT: But the idea, you contend, is captured  
9 in the phrase, "a mobile device capable of determining and  
10 displaying traffic information"?

11 MS. MOSER: Yes, Your Honor.

12 MR. SHUNK: May I add something, Your Honor? I  
13 know Ms. Moser has handled the argument so far, but if I can  
14 add a thought to that.

15 THE COURT: Yes.

16 MR. SHUNK: Your Honor, I think earlier in  
17 expressing your view on -- and your ruling on "traffic  
18 monitor" suggested that maybe mobile user stations could be  
19 a subset of traffic monitor. And there is an inconsistency  
20 in viewing it that way that will arise unless Your Honor  
21 also adjusts the definition of "vehicular movement."

22 And to unpack that, here is the fundamental issue.  
23 Because Judge Hubel has already defined "vehicular movement"  
24 to be "the measurement and flow of vehicles," plural, a  
25 traffic monitor must necessarily, because it measures



1 vehicular movement, measure multiple vehicles, whereas a  
2 mobile user station, because of the way it is, can only  
3 measure the movement of a vehicle, the one that it's located  
4 in.

5 So the real difference between the traffic monitor  
6 and the mobile user station, when you come right down to it,  
7 is that the traffic monitor must measure multiple vehicles,  
8 and the mobile user station measures one vehicle, and that's  
9 the result of the fact that the traffic monitor measures  
10 things that flow by, whereas the mobile user station just  
11 measures itself, in essence.

12 And I know we haven't discussed vehicular movement  
13 yet, Your Honor, but that kind of resolves the question and  
14 also would suggest that given Your Honor's decision with  
15 regard to "traffic monitor," I don't think it necessarily  
16 follows from that decision that mobile user stations could  
17 be a subset of traffic monitors.

18 THE COURT: Thank you.

19 I want to make clear that I raised that issue  
20 without holding that they were. I said that I wanted to  
21 hear further argument. I'm not even sure that's necessary  
22 that I reach any conclusion about whether they're a subset.  
23 Much of that comes up at dispositive motions, not claim  
24 construction. But we will get to "vehicular movement."

25 So we're now at a point where the distinction

1 between Traffic and the Court, on one hand, and Google on  
2 the other, is whether a mobile user station is a mobile  
3 device or an easily moving or movable device. After that,  
4 the distinctions tend to really become very small.

5 So what's your argument on whether it's a mobile  
6 device or an easily moving or movable device, or does that  
7 matter?

8 MR. QUISENBERRY: I don't think it's -- I mean  
9 we're happy if it just says "mobile."

10 THE COURT: All right.

11 So if Judge Hubel's definition was, "a mobile  
12 device capable of determining, transmitting, receiving  
13 and/or displaying traffic information," you'd be fine with  
14 that?

15 MR. QUISENBERRY: I didn't quite catch all of  
16 that. Were you reading from Judge Hubel's construction?

17 THE COURT: Yes, sir. So it says "easily  
18 movable." If we just call it a mobile device, since that's  
19 a word that probably doesn't need to be unpacked any further  
20 for the rest of the world to know something about it,  
21 "capable of determining, transmitting, receiving and/or  
22 displaying traffic information."

23 MR. QUISENBERRY: Traffic is fine with that.

24 THE COURT: Then the only issue there is that that  
25 puts "determining and transmitting" in the disjunctive, and

1 the parties agreed a moment ago that that should be  
2 conjunctive, right?

3 MR. QUISENBERRY: Well, could I address that?

4 THE COURT: Yes.

5 MR. QUISENBERRY: So I think that from my  
6 perspective, the concept that was driving our thinking on  
7 that issue was that the claim language that deals with  
8 "traffic information" says -- it recites a detector and a  
9 transmitter, and that's why we were focused on "detect and  
10 transmit."

11 For purposes of this one, I don't know that that  
12 same reasoning applies, but we're certainly okay with what  
13 Your Honor proposed just a moment ago for the construction.

14 THE COURT: I raised a concern about what I  
15 proposed a moment ago, which is that it creates confusion.  
16 We now have traffic monitors that must both detect or  
17 determine and transmit. That would be in distinction with  
18 mobile user stations that, under Judge Hubel's definition --  
19 and for that matter, Traffic's -- could simply determine but  
20 not transmit, or transmit and not determine.

21 Doesn't the patent essentially teach that the  
22 mobile user station must in some level detect some  
23 information and transmit it?

24 MR. QUISENBERRY: Now that I've kind of referred  
25 to these slides for my memory, the claim language for

1 "mobile user station" leads us to a different point than the  
2 claim language for the "traffic monitor," where there we had  
3 "detect and transmit."

4 Here, if you look at the way the claims are  
5 drafted, there's definitely a common denominator across all  
6 the claims that the mobile user station needs to display,  
7 because I believe that's recited in every single claim, and  
8 you've got a mobile device that could be a smartphone, for  
9 example, that has a display that displays the traffic  
10 information. So I would say "display" is something that  
11 needs to be in there.

12 And "receive" I believe also is something that  
13 should be in there, because in order for it to be displayed,  
14 it needs to be able to receive.

15 And then some of the other claims also recite a  
16 communicating device, which would suggest some ability to  
17 have -- to both send and receive back and forth from the  
18 computer system. So in certain instances, it will also need  
19 to be able to transmit, but that should not be a limitation,  
20 a core limitation on a mobile user station, because there  
21 are certain instances disclosed in the patent and the claims  
22 where transmitting from the mobile user station back to the  
23 computer system is not a requirement.

24 THE COURT: Your own proposal doesn't contain the  
25 word "display," and so in light of what you've just said,

1 and the idea that I've got to start off with a mobile user  
2 station being a mobile device, and everybody next to you  
3 uses the word "capable of" or "that can," which is the same  
4 as "capable of."

5 So a mobile device capable of what, in your view?

6 MR. QUISENBERRY: Receiving and displaying traffic  
7 information.

8 THE COURT: And yours says "determining and  
9 displaying." Your thoughts on this?

10 MS. MOSER: Yes, Your Honor.

11 As far as determining, the mobile user station  
12 always has to make some determination of the location of the  
13 mobile user station, and -- in all of the embodiments,  
14 because it's -- the information is transmitted back to the  
15 mobile user station based on the geographic location, and  
16 that determination is made in the computer system. So there  
17 is always some determining going on -- and there is a  
18 disagreement with Traffic on this -- always some  
19 transmitting going on.

20 THE COURT: Well, is the determining being done by  
21 the mobile user station or the network?

22 MS. MOSER: In terms of the geographic location?

23 THE COURT: Any determining. Is there any  
24 determining that necessarily is done by the mobile user  
25 station?

1 MS. MOSER: The mobile user station determines its  
2 geographic location by using the GPS, in coordination with  
3 the GPS receiver.

4 THE COURT: Does it determine its geographic  
5 location or does it receive that?

6 MS. MOSER: You know, in order to receive it, it  
7 has to send a request, so sending a request and getting  
8 something back.

9 THE COURT: If I send a request saying, "Where am  
10 I," and I get the answer back, I didn't determine my  
11 location, I received it?

12 MS. MOSER: I don't know, Your Honor. I don't  
13 know that that -- going down to that level.

14 Your Honor, I look at that as determining.

15 THE COURT: You said, "capable of receiving and  
16 displaying traffic information"?

17 MR. QUISENBERRY: Yes, sir.

18 THE COURT: And Judge Hubel said, "capable of  
19 determining, transmitting, receiving and/or displaying."

20 MR. QUISENBERRY: Correct.

21 THE COURT: And what was your objection to that  
22 that you filed?

23 MR. QUISENBERRY: Well, our objection there is  
24 that first of all --

25 THE COURT: I don't want to know what it is. I

1 want to know the objection you filed to the F&R. What was  
2 your objection?

3 MR. QUISENBERRY: Our objection that we filed was  
4 with respect to the word "and."

5 THE COURT: You wanted it to be "and/or"?

6 MR. QUISENBERRY: Correct.

7 THE COURT: So other than that, you didn't have  
8 any problem with "determining, transmitting" as part of the  
9 definition, as long as it is "and/or"?

10 MR. QUISENBERRY: So long as it's not a  
11 requirement, yes.

12 THE COURT: So if we captured the twin concepts of  
13 doing something and displaying, or rather transmitting,  
14 Judge Hubel's definition would read, "a mobile device that  
15 is capable of" -- Give me just a moment here.

16 It would be, "determining, receiving, or  
17 displaying and transmitting traffic information"?

18 MR. QUISENBERRY: We would not be in favor of  
19 that, Your Honor, because of the common denominator I  
20 mentioned a minute ago with respect to mobile user stations,  
21 is that they be able to display traffic information. So I  
22 believe the requirement in what Your Honor just dictated was  
23 "transmitted," and we don't believe that's a requirement of  
24 mobile user station.

25 THE COURT: Well, the objection you filed would

1 not make "display" a common denominator. It would make it  
2 one of several things the device could do.

3 MR. QUISENBERRY: Well, I was just trying to work  
4 with what the magistrate judge gave us and make the least  
5 edit to it as possible, and this is something that we  
6 could --

7 THE COURT: Well, that's not what we do with  
8 de novo review. I look at your objections as your current  
9 position on what the correct claim construction is. So I'm  
10 just trying to work with your objections, which I assumed  
11 meant that you were okay with the rest.

12 What you're telling me now is that you don't agree  
13 with Judge Hubel's list, you don't even really agree with it  
14 if I made the amendment that you suggest in the F&R. You  
15 don't really like that. You want something -- you want  
16 something in addition to what you sought in the objections  
17 to the F&R?

18 MR. QUISENBERRY: No, sir. We're perfectly happy  
19 with the amendment. So just add in the slash "and/or," and  
20 we're happy.

21 THE COURT: Right. But you're unhappy if I do  
22 something different that accomplishes the same thing by  
23 making display just one thing that ought to happen, even  
24 though that's what the proposal that you -- even though  
25 that's what Judge Hubel has done with your proposal?



1 MR. QUISENBERRY: I might have misunderstood Your  
2 Honor.

3 THE COURT: If I engage in claim construction that  
4 makes display just one of several things the mobile user  
5 device can do, you disagree with that because it makes  
6 displaying just one of several things the mobile user device  
7 can do?

8 MR. QUISENBERRY: No, sir. What I heard Your  
9 Honor say is that a mobile user station must be able to  
10 transmit. And maybe I misunderstood what Your Honor  
11 dictated, but that's what I heard.

12 THE COURT: And your answer is a mobile user  
13 station must be able to display?

14 MR. QUISENBERRY: Correct.

15 THE COURT: And that it can do one of several  
16 other things: determine, transmit or receive?

17 MR. QUISENBERRY: Yes.

18 THE COURT: So if Judge Hubel's claim construction  
19 read, "a mobile device that is capable of determining,  
20 transmitting or receiving and displaying traffic  
21 information," you'd be fine?

22 MR. QUISENBERRY: Yes, sir.

23 THE COURT: Not only fine, but even happier than  
24 the objection you made to the F&R?

25 MR. QUISENBERRY: I wouldn't go that far, but I'm

1 fine with that, if that's what the Court decides to do.

2 THE COURT: It's not a -- I stated it somewhat  
3 frivolously. It's not a frivolous question. It gets to  
4 what are you really after here.

5 We're at de novo review. What I expect from you  
6 is your proposed construction to be what you think is the  
7 accurate representation of "mobile user station," not the  
8 best compromise you can get, working with Judge Hubel's  
9 existing language.

10 And so one, I thought, reflected what you're  
11 actually telling me should happen here. The other you told  
12 me was sort of half a loaf, in light of what Judge Hubel  
13 said.

14 I want the former not the latter. Which is it? I  
15 want the one that's your best construction of "mobile user  
16 station."

17 MR. QUISENBERRY: The best one is what Judge Hubel  
18 gave us, with adding in "slash or."

19 THE COURT: Even though that makes displaying  
20 optional?

21 MR. QUISENBERRY: Yes.

22 THE COURT: So you disagree with what you said  
23 earlier, that the irreducible minimum here is that it ought  
24 to display?

25 MR. QUISENBERRY: I believe that's a true

1 statement.

2 So, in light of that, I believe that --

3 THE COURT: The disjunctive ought to come before  
4 "display," and the conjunctive means the displaying always  
5 happens, right?

6 MR. QUISENBERRY: Yes.

7 THE COURT: Thank you.

8 That's what I want to hear, not your compromise  
9 proposal, but what you think the claim language provides.

10 MR. QUISENBERRY: Yes, sir.

11 THE COURT: That's how we'll define "mobile user  
12 station": "A mobile device that is capable of determining,  
13 transmitting or receiving and displaying traffic  
14 information."

15 Let's take a brief break here, and we'll take back  
16 up after five minutes.

17 THE CLERK: This court is in recess.

18 (A recess is then taken.)

19 THE COURT: Thank you. I didn't mean to keep you  
20 waiting. I had to take an important phone call that took  
21 longer than I thought.

22 We were still sort of beating to death "mobile  
23 user station." I think we're close. I intend not to  
24 completely rule on all these from the bench here today, but  
25 the fundamental idea is that a mobile device capable of

1 something, and I believe it will be as I just described.

2 I'll take some time to think about it, but I believe it will  
3 be, "capable of determining, transmitting or receiving and  
4 displaying traffic information."

5 All right. That's two.

6 So let's turn to -- I think what we'll do is turn  
7 to "traffic information." That will be followed by the two  
8 contested terms that have that phrase, "traffic information"  
9 in them, and then on down from there, ending with "vehicular  
10 movement."

11 So let's turn to "traffic information."

12 All right. Again, I'm sort of comparing in my own  
13 mind the Court's construction with the two proposals, and I  
14 agree with the clause that Judge Hubel added, which is in  
15 Google's proposal -- well, I think I agree with the clause,  
16 "as detected by one or more traffic monitors." So that's  
17 issue number one.

18 The second is that I agree with the Court's  
19 decision -- or I tentatively agree with the Court's decision  
20 not to limit the information to current speed, frequency,  
21 flow, et cetera.

22 And then the third debate, if there really is one,  
23 is about -- so, one is it's information not necessarily  
24 current; and two is that it's gathered or detected by one or  
25 more traffic monitors; and the third is what goes in the

1 list.

2 The Court's construction has "travel, frequency  
3 and position." Google's has "speed, frequency or flow."  
4 And Traffic has, "speed, motion, density, flow, frequency."  
5 It also has "velocity."

6 I recognize that, in a scientific sense, there's a  
7 difference between "speed" and "velocity," but I don't  
8 believe those terms are used differently in this patent, so  
9 I don't know why we'd have both.

10 So that's a little bit less of an important  
11 debate. It's some combination of those words as to what  
12 goes into "traffic information."

13 And then finally, Google has the word "multiple,"  
14 which doesn't -- it isn't expressed in the Court's  
15 construction, but both the Court and Traffic use the word  
16 "vehicles."

17 So I don't know that there's a real distinction  
18 there. There is in the way the parties have subsequently  
19 written it up to me, but the proposal, at least, from  
20 Traffic, originally said "vehicles," while "vehicles" is  
21 plural, although I believe Traffic currently wants to make  
22 sure that the traffic information is about one or more  
23 vehicles.

24 So those are the debates.

25 Let's start with, "as detected by one or more

1 traffic monitors," which is in the Court's construction and  
2 Google's proposal.

3 Why do you believe that's important?

4 MR. SHUNK: Your Honor, if I may address that  
5 point.

6 I must say I'm a little uncertain about how to  
7 proceed, because of course our view is that "traffic  
8 information" is indefinite and therefore can't be -- a  
9 definition can't be elicited from the patent or the prior  
10 art or the specification.

11 THE COURT: Well, there's absolutely nothing wrong  
12 with simply resting on that. You don't have to try to  
13 propose something that you think works for a term that you  
14 believe to be indefinite. I don't hold that argument  
15 against you in any way. If that's your argument, you are  
16 putting your eggs in that basket, but --

17 MR. SHUNK: And, of course, I don't want to,  
18 because if it is determined that it is definite, then I'd  
19 like to offer the Court the best definition I can come up  
20 with, short of the argument, and that's what we have  
21 attempted to do.

22 In other words, given the fact that we don't think  
23 "traffic information" is clearly defined in the patent,  
24 where we go -- and I think this is the way Judge Hubel  
25 went -- was to look at what it actually says in the patent

1 about the specific examples of traffic information as  
2 described. And I think that's an appropriate direction to  
3 go, not waiving the indefiniteness argument, but attempting  
4 to get the best you can out of the patent. That's certainly  
5 what was done in the *ICU Medical* case that we cite, where  
6 the Court said yes, *Phillips* says don't import restrictions  
7 from the specification into the claims, but nevertheless it  
8 goes on to say the particular limitation described in that  
9 case was only described in one particular way throughout the  
10 patent, and therefore adopted that particular definition.

11 So --

12 THE COURT: Why do you propose, "as depicted by  
13 one or more traffic monitors," instead of proposing, "as  
14 detected by one or more traffic monitors or mobile user  
15 stations"?

16 MR. SHUNK: Because mobile user stations are never  
17 described as themselves getting or determining traffic  
18 information.

19 THE COURT: And why -- Thank you. So it's a  
20 textual argument, basically?

21 MR. SHUNK: Yes.

22 THE COURT: That is just not something you believe  
23 can be found in the patent?

24 MR. SHUNK: That's right. In other words, the one  
25 place that you see the mobile user station providing

1 information is to the traffic information database, and I  
2 think this is certainly an argument that Traffic makes that  
3 I think confuses the issue. The "traffic information  
4 database," which is a claim term in Claim 21, is actually a  
5 database of traffic information; that is, information about  
6 the movement of multiple vehicles.

7 It then says in Claim 22 that it can be augmented  
8 by information that is obtained from traffic monitors. So  
9 it's not really necessary -- I should say that the way we  
10 view the traffic information database is that it's  
11 historical information. It's information that may be  
12 computed by the database itself, but when it needs to be  
13 augmented, it's augmented by traffic monitor information.  
14 Traffic monitors are what obtain the information, and mobile  
15 user stations are what display the information,  
16 fundamentally.

17 Now, the patent does talk about the fact that  
18 mobile user stations can also transmit their location, and  
19 it talks about the fact that that can be used in order to  
20 assemble information that goes into a traffic information  
21 database, but it doesn't say that the mobile user stations  
22 themselves transmit traffic information, it only discusses  
23 the transmission of traffic information by one or more  
24 traffic monitors.

25 And I think that's the reasoning that Judge Hubel



1 saw in requiring that traffic information be something that  
2 is as detected by one or more traffic monitors.

3 THE COURT: So your view is that traffic  
4 information is detected by traffic monitors?

5 MR. SHUNK: Yes.

6 THE COURT: But that the traffic information  
7 database can contain two things: traffic information as  
8 detected by traffic monitors, and something else augmented  
9 or derived from mobile user stations?

10 MR. SHUNK: Yes, Your Honor. In other words, if  
11 you notice, our proposal, the proposal for "traffic  
12 information database" is very similar to "traffic  
13 information," except that it doesn't require that it be  
14 detected by one or more traffic monitors.

15 So to --

16 THE COURT: You mean that's your limitation on  
17 "traffic information"?

18 MR. SHUNK: That's right.

19 THE COURT: Without that limitation being imposed  
20 on "traffic information database"?

21 MR. SHUNK: Yes. We don't import that "as  
22 detected by one or more traffic monitors" into the  
23 definition of "traffic information database" because we  
24 think the database is broader, that it's simply the traffic  
25 information that the traffic monitors transmit.

1 THE COURT: Which you get specifically from Claim  
2 22?

3 MR. SHUNK: Yes, among other things.

4 THE COURT: Thank you.

5 What objection do you have, if any, to "traffic  
6 information" being defined at least in part as "detected by  
7 one or more traffic monitors"?

8 MR. QUISENBERRY: Okay. Let me just kind of talk  
9 about this generally. So there are the two independent  
10 claims, Claim 1 and Claim 21. Claim 1 recites "traffic  
11 monitors." Claim 21 does not recite "traffic monitors," but  
12 instead it recites "mobile user stations." Claim 22, which  
13 depends on Claim 21, adds in "traffic monitors."

14 So we think there's a very strong claim  
15 differentiation argument that says that it's improper to  
16 read the traffic monitor limitation from Claim 22 into Claim  
17 21. That's, I think, you know, a very strong point.

18 Let me --

19 THE COURT: We'll come to claim differentiation  
20 later. Quite frankly, my concern is that I've heard two  
21 different sort of proposals of what Claim 22 does, and  
22 without deciding the issue at all, I'll just say that both  
23 of them appear to be -- both appear to have claim  
24 differentiation issues in them. So I'm not sure there's a  
25 way out of that box for me with Claim 22.

1           Be that as it may, your main argument as to why  
2     "traffic information" should not contain the limitation, "as  
3     detected by one or more traffic monitors," comes from  
4     essentially Claim 21 and 22 read together?

5           MR. QUISENBERRY: Well, coupled with the fact that  
6     Claim 1 expressly recites a traffic monitor, whereas Claim  
7     21 doesn't recite a traffic monitor at all.

8           And then here's the other point. If you take that  
9     construction of "traffic information" that has the phrase at  
10    the end that says, "as detected by one or more traffic  
11    monitors," and then you plug that into Claim 21, you're  
12    clearly importing the traffic monitor into Claim 21. We  
13    just think that's an improper importation of a limitation  
14    from the specification that's just not in the claim.

15          And if I could add --

16          THE COURT: So what are the sources, according  
17    to -- for one reading the patent, where does the traffic  
18    information come from?

19          MR. QUISENBERRY: Well, it can come from -- well,  
20    I mean, looking, for example, at Claim 1 of the '862 patent,  
21    the way the claim is laid out, the first thing that happens  
22    is you have the traffic monitors that are recited that have  
23    the detector and the transmitter, and the detector detects a  
24    signal.

25          THE COURT: I don't need to know the mechanism.

1 You're just telling me that one source of traffic  
2 information in Claim 1 is traffic monitors?

3 MR. QUISENBERRY: True.

4 THE COURT: What other source does the patent  
5 teach us about -- of traffic information?

6 MR. QUISENBERRY: Well, let me point you to one.  
7 I pulled it up on the screen.

8 And this is something that the magistrate judge  
9 quoted at page 22 of his order. He's quoting from column  
10 13, lines 19 through 21 of the specification.

11 I mean, I can read it. "In addition, the  
12 specification states that the computer system may provide  
13 traffic information without the use of monitors at all,  
14 relying solely on information derived from the mobile user  
15 stations."

16 So when I hear from Google that -- basically  
17 directly the opposite of this, I think is what I heard, that  
18 you can't get traffic information that is derived from a  
19 mobile user station, I believe that this evidence from the  
20 specification shows that that's incorrect.

21 THE COURT: All right. Let's ignore for a moment  
22 the list that the Court's construction has in it: speed,  
23 direction, frequency. We'll come back to what should be in  
24 the list and what shouldn't.

25 I take it, then, that you'd have no objection to a

1 construction that said, "the actual speed, et cetera, of  
2 vehicles traveling on a road, as detected by one or more  
3 traffic monitors and/or mobile user stations"? In other  
4 words, there's no other source for traffic information than  
5 those two sources in the patent?

6 MR. QUISENBERRY: This is something I haven't  
7 given a lot of thought to.

8 THE COURT: Well, is there in the patent any other  
9 source for traffic information? Is the patent claiming  
10 traffic information from the wide world, news broadcasts,  
11 newspapers?

12 MR. QUISENBERRY: As I sit here, without going  
13 back and viewing the patent in light of the question, I  
14 can't think of anything else that's disclosed in the patent  
15 that would be a source other than traffic monitors or mobile  
16 user stations.

17 THE COURT: Well, if I thought it was a hard or a  
18 tricky question, I might give you more time, but it doesn't  
19 seem to be either, really. That's all this patent is  
20 claiming, isn't it, that traffic information coming at most  
21 from traffic monitors and mobile user stations, nowhere  
22 else?

23 MR. QUISENBERRY: It doesn't strike me as a tricky  
24 question either, Your Honor. I think the answer to that is  
25 yes.

1 THE COURT: All right.

2 MR. QUISENBERRY: I just am a little bit uneasy  
3 without having thought about it.

4 THE COURT: Let's go to the list. I have a hard  
5 time sorting through what really matters here. Speed,  
6 frequency, flow; speed, velocity, motion, density, flow,  
7 frequency; speed, direction, frequency, and position. Those  
8 are the three.

9 Do you have any thoughts from Traffic about which  
10 of these are really fairly included in the concept of  
11 "traffic information," as found in the patent?

12 First of all, let's start with an easy one. Do  
13 you need speed and velocity?

14 MR. QUISENBERRY: I don't think it's critical.

15 THE COURT: All right. And everybody says flow --  
16 well, no, you and Google say flow. The Court doesn't.

17 You suggest motion. I guess you are just pulling  
18 that out of one piece of the patent?

19 MR. QUISENBERRY: I believe so, Your Honor.

20 THE COURT: Your words just come from various  
21 places in the patent, right?

22 MR. QUISENBERRY: That's true.

23 THE COURT: Which is why you put "speed and  
24 velocity," since the patent either says "speed (velocity)"?

25 MR. QUISENBERRY: Correct.

1 THE COURT: Thankfully it doesn't say, "frequency  
2 (number of times), vehicles (cars)."

3 We'll give you speed but not velocity.

4 I'll work through that myself. I'm not sure how  
5 important the list is.

6 I recognize that your contention -- well, first I  
7 recognize the box you're in with indefiniteness. This is at  
8 the crux of indefiniteness. Assuming we work our way around  
9 indefiniteness somehow, you've contended that traffic  
10 information comes from one source, and that traffic  
11 information database can have two sources?

12 MR. SHUNK: Yes, Your Honor.

13 THE COURT: So you, I assume, believe that  
14 "traffic information" should not be defined to come from  
15 possibly traffic monitors and/or mobile user stations?

16 MR. SHUNK: That's right.

17 THE COURT: And that's inconsistent with what  
18 claim, what patent language?

19 MR. SHUNK: Well, for example -- and first of all,  
20 I would disagree with Mr. Quisenberry. I think we have  
21 taken into account the differences between Claim 1 and 21,  
22 in the fact that we defined "traffic information" to be, "as  
23 detected by one or more traffic monitors," but we don't  
24 limit "traffic information database" in that way. And I  
25 think that that's how we have accommodated the fact that the

1 traffic information database may have several sources, but  
2 traffic information itself has only one source, and that is  
3 the traffic monitor.

4 Now, looking at the claim language, to respond to  
5 specifically to Your Honor's question, in Claim 1 --

6 THE COURT: May I pause you for just a moment.

7 MR. SHUNK: Sure.

8 (There is a pause in the proceedings.)

9 THE COURT: I'm sorry. Go ahead.

10 MR. SHUNK: Thank you, Your Honor.

11 Claim 1 and subsection (e) requires that what is  
12 transmitted or provided in this case to the mobile user  
13 stations is, "traffic information representative of said  
14 signals transmitted by said traffic monitors."

15 So we would argue that the actual language of the  
16 claim explains that the traffic monitors are the source of  
17 the traffic information that is of relevance to, you know,  
18 to the invention.

19 And then if you look over at Claim 22, it talks  
20 about the system of Claim 21, which has the traffic  
21 information database in it, "wherein a computer system is  
22 connected to the traffic monitors and the traffic  
23 information database contains data derived from said traffic  
24 monitors," the implication being that with regard to Claim  
25 21, that because the dependent claim is limited, Claim 21 is



1 broader than it, so Claim 21 then gets information that is  
2 derived from the monitors and information that's derived  
3 from other sources.

4 And Claim 23, dependent on Claim 22, has the  
5 computer system updating the traffic information database  
6 based on data received from the mobile user stations, not  
7 traffic information received from them but on data.

8 So, again, the grand scheme, mobile user stations  
9 don't transmit traffic information. They transmit data  
10 about individual vehicles.

11 Now, the traffic information database might take  
12 that information on individual vehicles and update the  
13 traffic information database based on it, but that doesn't  
14 change the fact that it's -- that traffic monitors gather  
15 the traffic information, but the mobile user stations do not  
16 gather the traffic information.

17 So I disagree with Mr. Quisenberry that Claims 21,  
18 -2 and -3 belie our argument. In fact, I think they support  
19 it, because they show that there are two distinct sources of  
20 information in the traffic information database. One of  
21 them is giving traffic information. The other is simply  
22 supplying data that is then somehow -- and it's not clear  
23 from the patent, but is somehow massaged to update the  
24 traffic information that's in the database.

25 THE COURT: And 21, in your view, sub (d), simply

1 describes mobile user stations getting some undefined subset  
2 of information from the traffic information database?

3 MR. SHUNK: Yes.

4 THE COURT: It's not necessarily traffic  
5 information, as earlier defined?

6 MR. SHUNK: Right.

7 THE COURT: Because if it got traffic information,  
8 your view is getting it is not the same as inputting into  
9 it? Receiving it is not the same?

10 MR. SHUNK: The mobile user stations provide data  
11 which might be useful in updating the traffic information  
12 database or might be somehow aggregated to create traffic  
13 information, but the mobile user stations don't themselves  
14 transmit traffic information.

15 THE COURT: All right. Thank you.

16 Do you wish to reply?

17 MR. QUISENBERRY: Yes, Your Honor.

18 THE COURT: Go ahead.

19 MR. QUISENBERRY: I'm just looking for an example  
20 here.

21 If you look at column 12, for example, line 38,  
22 there's a paragraph there that begins, "In a preferred  
23 embodiment".

24 THE COURT: Yes.

25 MR. QUISENBERRY: So I'll read that. I believe

1 there's a passage here that supports -- or that is contrary  
2 again to what we're hearing from Google.

3 "In a preferred embodiment, the system obtains  
4 traffic information from users that have a GPS receiver  
5 (62). In this system, whenever a user station (52) requests  
6 traffic information from the computer system, the computer  
7 system associates the velocity of that particular user with  
8 its current location."

9 I believe that that right there is an example of  
10 velocity that's coming from the mobile user station. That's  
11 an example of traffic information.

12 And then if I can just direct the Court again  
13 to --

14 THE COURT: Well, I guess I thought you were going  
15 to rely on the first phrase, "the system obtains traffic  
16 information from users."

17 MR. QUISENBERRY: I think that's equally helpful.  
18 I guess it just didn't specify the mobile user station  
19 there, and that's why I went a little bit further.

20 And then if I could, I mean, this is -- this  
21 sounds to me like it could be an important point, and we're  
22 really at opposite ends of the spectrum from Google on this  
23 question of whether or not a mobile user station can be used  
24 to generate traffic information. I believe the quote that I  
25 read a minute ago from -- that the magistrate judge relied

1 on in page 22 of his order is another one. Again, this is  
2 column 13, line 19 to 21, where the examiner said, "In  
3 addition, the specification states that the computer system  
4 may provide traffic information without the use of monitors  
5 at all."

6 That's an example of what's happening in Claim 21.  
7 Again, it only recites a mobile user station. It doesn't  
8 recite a traffic monitor. The traffic monitor doesn't enter  
9 the picture until you get down to a dependent claim. And,  
10 you know, we think that's improper to import "traffic  
11 monitor" into Claim 21, and that's what's happening by  
12 including it in the definition of "traffic information."

13 Now, I have another response, if I may, to another  
14 point that Mr. Shunk made. He referred to Claim 1(e) as  
15 support for including the traffic monitor limitation at the  
16 end of the construction of "traffic information."

17 I agree with him that if this was the only claim,  
18 then he would have an argument with respect to that claim.  
19 But the problem is there's nothing in the specification that  
20 requires traffic information to come from traffic monitors,  
21 and you've got Claim 21 that doesn't include a traffic  
22 monitor and doesn't include this same language that  
23 Mr. Shunk is pointing to in Claim 1.

24 THE COURT: Well, Claim 1(e) does state that,  
25 taken by itself, traffic information essentially comes from

1 or is representative of signals transmitted by traffic  
2 monitors. So starting with that, you need somewhere else to  
3 really contradict that, at least to get past it.

4 What is it that you're relying on in the claim  
5 language where traffic information comes from something  
6 other than traffic monitors? And I said starting with claim  
7 language.

8 MR. QUISENBERRY: Well, certainly in Claim 1  
9 there's not going to be anything, because this is a claim  
10 that's directed to the traffic information coming at least  
11 from traffic monitors.

12 So I would direct the Court's attention to Claim  
13 21, which doesn't say anything -- it doesn't include this  
14 same language that says, "traffic information representative  
15 of said signals transmitted by said traffic monitors." That  
16 phrase is not in Claim 21.

17 THE COURT: I understand that. And I guess that's  
18 what I'm asking. You have in Claim 1(e) language that  
19 defines "traffic information" as "coming from said traffic  
20 monitors."

21 So to point me at 21 and say, "Well, that's not  
22 repeated in 21," doesn't get you very far, at least in terms  
23 of claim language. I'm not saying that we only rely on  
24 claim language, but the fact that 21 doesn't repeat the  
25 definition in Claim 1, that is a sort of a weak inferential

1 argument.

2 I'm looking for you to point to me somewhere where  
3 "traffic information" in the claim language is defined as  
4 coming from more than traffic monitors.

5 I think your answer is there's nowhere in the  
6 claim language that it does that, let's turn to  
7 specifications and embodiments, right?

8 MR. QUISENBERRY: I believe that's correct.

9 THE COURT: All right. Thank you.

10 MR. SHUNK: May I respond briefly to that last  
11 point?

12 THE COURT: Just let him finish.

13 MR. SHUNK: I'm sorry, Your Honor.

14 THE COURT: That's all right.

15 MR. QUISENBERRY: The only thing I was going to  
16 add again was the claim differentiation argument between 21  
17 and 22.

18 THE COURT: And I don't want to get too deeply  
19 into that, since I've punted on it, but your argument there  
20 is, if I understand it, that a definition of "traffic  
21 information" as coming only from traffic monitors renders 22  
22 essentially superfluous to 21?

23 MR. QUISENBERRY: Well, if you include the traffic  
24 monitor limitation in "traffic information," that is going  
25 to import the traffic monitor limitation into Claim 21.

1 THE COURT: Yes.

2 MR. QUISENBERRY: And we believe that the doctrine  
3 of claim differentiation precludes that because the  
4 limitation "traffic monitor" that is sought to be imported  
5 is found in a dependent claim.

6 THE COURT: Claim 22?

7 MR. QUISENBERRY: Yes, sir.

8 THE COURT: All right. Which is what I thought I  
9 said, that if you defined it that way, 22 becomes  
10 superfluous. You don't need it anymore because you've  
11 already made that limitation elsewhere.

12 Is that the idea of claim differentiation, then?  
13 In other words, there's no further need for 22 if you import  
14 the "traffic information monitor" limitation into "traffic  
15 information"?

16 MR. QUISENBERRY: Yes.

17 THE COURT: All right.

18 And again, I'm not going to go on with this very  
19 long, but just in a nutshell for me, if you don't do that,  
20 you don't import "traffic information monitor" as a  
21 limitation on the term "traffic information," what does 22  
22 add to 21?

23 MR. QUISENBERRY: 22 adds that the computer system  
24 is connected to a plurality of traffic monitors, number one.  
25 I mean, now you've got a claim that specifically recites

1 both a mobile user station and a computer system that is  
2 connected to a plurality of traffic monitors, and then  
3 there's additional language there in Claim 22.

4 THE COURT: All right. Thank you.

5 Go ahead.

6 MR. SHUNK: Thank you, Your Honor.

7 Just responding to two points that Mr. Quisenberry  
8 made. First of all, Claim 22 isn't superfluous because it  
9 claims the computer system being connected to the traffic  
10 monitors and deriving the traffic via the information  
11 database from the monitors. That is smaller in scope than  
12 the possibility that the traffic information database comes  
13 from a remote database that it is not -- that the database  
14 is not connected to; for example, a historical database of  
15 traffic times and conditions that it might extract traffic  
16 information from.

17 So, in other words, it's very possible to read 22  
18 as being a subset of a greater universe of traffic  
19 information databases that come from traffic monitors, ones  
20 that are both connected to the system and ones that are no  
21 longer or have never been connected to the system.

22 THE COURT: All right.

23 MR. SHUNK: Secondly, again looking at the claim  
24 language, notice that the claim language of 22 talks about  
25 the information database being built from the traffic



1 monitors. 23 only talks about the mobile user stations  
2 updating the database based on data.

3 And the final point that I would make very  
4 quickly, Your Honor, is that in the specification section  
5 that Mr. Quisenberry read and that was quoted by the  
6 magistrate, the specification says that "The system may  
7 provide traffic information without the use of monitors,  
8 relying solely on information derived from the mobile user  
9 stations."

10 It doesn't say the system may obtain traffic  
11 information without the use of monitors. What that is  
12 explicitly teaching is the possibility that data -- not  
13 traffic information but simply individual vehicular data is  
14 obtained from -- by the system, and then the system  
15 essentially cooks that into traffic information, but it does  
16 not at all undercut the fundamental principle that traffic  
17 information is information about multiple vehicles, and  
18 therefore cannot be provided -- it cannot be provided by an  
19 individual mobile user station.

20 THE COURT: And in terms of the limitation on  
21 "traffic information from traffic monitors," that limitation  
22 being absent from "traffic information database," that's  
23 what Judge Hubel did?

24 MR. SHUNK: Yes.

25 THE COURT: You don't disagree with that at all?

1 MR. SHUNK: No.

2 THE COURT: Finally, on "traffic information,"  
3 Traffic's proposal and the judge's construction used the  
4 word "vehicles." Google has made much of multiple vehicles.  
5 What's the difference between multiple vehicles and  
6 vehicles?

7 MR. QUISENBERRY: Two seconds?

8 THE COURT: Sure.

9 (There is a pause in the proceedings.)

10 MR. QUISENBERRY: Thank you, Your Honor.

11 So there may not be any disagreement on this one.  
12 We've agreed with a portion of the magistrate judge's  
13 construction that talks about vehicles.

14 THE COURT: All right. Thank you.

15 There are two related terms defined by Judge  
16 Hubel: "Traffic information representative of said signals  
17 transmitted by said traffic monitors," and however one goes  
18 on defining "traffic information." I don't see a lot of  
19 difference among the parties at the core of this phrase. It  
20 just is sort of driven by the definition of "traffic  
21 information."

22 So I don't need to hear further argument on that  
23 one.

24 And finally, "traffic information database  
25 containing data representative of traffic," I feel the same

1 way about that, that however one goes with defining "traffic  
2 information," even as a part of this term -- in other words,  
3 the Court defined "traffic information" here, "collected by  
4 traffic monitors and/or mobile user stations." I'm not sure  
5 the rest of that matters a lot. The parties all agree --  
6 all define "database" in some way; Traffic as "a collection  
7 of traffic information."

8 I guess that's where you wanted to think further  
9 about whether this database contained anything other than  
10 something received from traffic monitors and mobile user  
11 stations, right?

12 MR. QUISENBERRY: I would say that it could  
13 include information from both and/or traffic monitoring.

14 THE COURT: I understood that, but instead of  
15 saying that, you've said "a collection of traffic  
16 information."

17 "Traffic information" is defined earlier by you as  
18 "something coming from and/or" -- correct? "Mobile user  
19 stations and/or traffic monitors."

20 So, in your view, if you defined "traffic  
21 information" your way, then "database" doesn't require much  
22 of a definition; isn't that right?

23 MR. QUISENBERRY: Well, we have some other points  
24 about the "traffic information database" limitation that are  
25 separate and apart but would not be resolved by the

1 construction of "traffic information," I don't believe. I  
2 mean, for example, if you look at -- I may be jumping around  
3 here, but "traffic information representative of," that  
4 phrase.

5 THE COURT: Yes.

6 MR. QUISENBERRY: The magistrate judge said that  
7 that's "traffic information detected and transmitted by  
8 traffic monitors."

9 And the problem that we see there is that as you  
10 plug that definition in for that phrase, it reads out the  
11 relationship between the signals that are used to then  
12 create the traffic information.

13 So this is a situation where he's essentially  
14 saying that the traffic information actually has to be  
15 detected at the traffic monitor location. And the way the  
16 claim reads, for example, if you look at Claim 1 of the '862  
17 patent, it starts out by saying that the traffic monitor  
18 collects or transmits a signal that's representative of  
19 vehicular movement, or something like that. So you've got a  
20 signal that comes from the traffic monitor, goes to the  
21 receiver and then to the computer system, and then from the  
22 computer system, that is where the traffic information comes  
23 to life and is transmitted out to the mobile user station.

24 But the way the magistrate judge construed that  
25 phrase by saying that it's traffic information detected and

1 transmitted by traffic monitors, that distinction  
2 disappears.

3 THE COURT: All right. Thank you.

4 As I said, in my view these are driven by the  
5 resolution of the question of what "traffic information"  
6 means, and I'll resolve them following the oral argument, in  
7 light of how I rule on "traffic information."

8 I'm inclined to agree with the Court and Google's  
9 argument that -- the Court's construction and Google's  
10 argument that the claim language itself describes "traffic  
11 information" as coming from traffic monitors.

12 It's a bit of a hierarchy of source of argument  
13 that concerns me here, since that language, that meaning of  
14 "traffic information" comes from the claim language, and the  
15 only thing contrary I'm aware of comes from something lower  
16 down the eristic hierarchy than claim language.

17 Let's turn to -- I understand that "less than all  
18 available traffic information" has been withdrawn.

19 MR. QUISENBERRY: Yes.

20 THE COURT: I don't need to hear more about  
21 "information representative of selected portions of said  
22 traffic information database," other than focusing on the  
23 Court's construction using the word "selects." And I think  
24 one and possibly both parties are concerned that that adds a  
25 step by users not really found in the patent itself.

1 I know that's Traffic's concern, is it not?

2 MR. QUISENBERRY: Yes, that's one of them.

3 THE COURT: So I just want to focus on the fact  
4 that it's a subset of information from the database, no verb  
5 in there of "selecting by users."

6 MR. QUISENBERRY: Right. And there's something I  
7 discovered, Your Honor, when I was preparing for this  
8 hearing, going back through the magistrate judge's order.  
9 And if I could just pull up another slide?

10 THE COURT: Yes.

11 I'll step down. I've lost my signal again.

12 Go ahead, I'll read it down here.

13 Go ahead.

14 MR. QUISENBERRY: Okay. So this is something that  
15 the magistrate judge wrote in his Markman orders, page 17  
16 and 18.

17 He says, "On this record, the Court agrees with  
18 Traffic that neither the claim nor its specification  
19 describes the need for a user to take any steps to cause the  
20 mobile user station to request information from the computer  
21 system."

22 We believe that -- I need to be clear here that he  
23 said this in a different place in his order. He was not  
24 talking about this claim term.

25 But what I did is -- then he quoted from a passage

1 of the '862 patent. It's in the specification. And I have  
2 done this side-by-side comparison so that you can see that  
3 the language that he was quoting in this spec lines up  
4 directly with the language in Claim 21(d).

5 And so the point is, is that I think that  
6 there's -- there's a recognition at least on behalf of the  
7 magistrate judge that the user -- that there should be no  
8 action required by the user in order for the mobile user  
9 station to make a request for information from the computer  
10 system.

11 THE COURT: Google's proposal doesn't contain the  
12 concept of a selection or request by a user; rather, it  
13 focuses on what the subset of information is that's being  
14 described by this term.

15 So I take from that, you don't really object to  
16 the idea that a more accurate construction might delete the  
17 idea of a selection by a user of the mobile user station of  
18 this information?

19 MR. SHUNK: I'm not sure I understand, Your Honor,  
20 frankly. We have in our proposal requested that a subset of  
21 "which is selected by the commuter" be part of the  
22 definition. And the Court, I believe, agreed with us that  
23 the user selects portions of the information database.

24 So I think we're in accord with Judge Hubel that  
25 the user is selecting the portion of the database that he

1 wants to see or she wants to see.

2           The confusion comes from the fact that the place  
3 that Mr. Quisenberry read from the magistrate judge's order,  
4 and again from the specification, isn't talking about  
5 selecting a portion of the database; it's, rather, the part  
6 that talks about the making a request for information and  
7 then the system providing response. And the magistrate was  
8 addressing the *IPXL* indefiniteness argument, and saying that  
9 he believed there was no requirement that the human being  
10 take the step of requesting information, and therefore in  
11 his view -- and we disagree respectfully with him -- he  
12 believed that *IPXL*'s indefiniteness finding wasn't  
13 triggered.

14           However, that's different from the question of  
15 whether the data -- the portion of the database requested is  
16 controlled by the user or not. And to give you a simple  
17 example of what that talks about, for example, you may want  
18 to look at what's the traffic going to be like going home  
19 tonight. Well, you could look at just a five-block radius  
20 around the courthouse, or you could look at the entire  
21 county and see what the roads look like, or you could look  
22 at a quadrant of the state, depending on how far you wanted  
23 to go. That, we believe, the specification teaches that the  
24 user, the human being must select.

25           And before coming today, we did a word search on



1 the specification, and every time the word "select" is used  
2 in the specification, at least as far as we could see, the  
3 selection was done by a human being, a user.

4 So -- and we think, frankly, the plain word itself  
5 "select" implies human intervention, because computers don't  
6 select things, they respond to certain inputs. But  
7 selection implies a will.

8 THE COURT: I guess I have a lot of trouble with  
9 that concept. Computers select things all the time.  
10 Somebody is sending me ads for products that I've never  
11 desired on the computer every day, so I hope that's not a  
12 human doing that.

13 But I get your point that you're in accord with  
14 the Court that the phrase, the term we're defining here,  
15 "information representative of selected portions of said  
16 traffic," assume "traffic information database" should be  
17 defined as in essence a subset of the total traffic  
18 information database in some manner selected by -- you say a  
19 commuter, but the claim language is the user of the mobile  
20 user station.

21 MR. SHUNK: Yes. And we wouldn't object to "user"  
22 being substituted for "commuter." I think we chose  
23 "commuter" because in the specification, the word "commuter"  
24 is used. But I don't see a big difference between  
25 "commuter" and "user."

1           And perhaps "user" is better, as I think about it,  
2           because certainly this information and these claims are not  
3           limited to simply people who are commuting back and forth to  
4           work, but anyone who is seeking to understand traffic  
5           information in the context of specific geographic origins.

6           THE COURT: All right. Thank you.

7           The last phrase I want to hear about is "vehicular  
8           movement."

9           MR. QUISENBERRY: Your Honor --

10          THE COURT: Yes?

11          MR. QUISENBERRY: May I just respond?

12          THE COURT: On "information"?

13          MR. QUISENBERRY: Yes, sir.

14          THE COURT: Yes, but you'll owe me a sandwich from  
15          the restaurant of your choice if you repeat yourself at all.

16          MR. QUISENBERRY: Okay. I don't think I'm going  
17          to have to deliver on that.

18          Here's what I'd like to do, because we haven't  
19          walked through Claim 21(d) yet. Okay. And I've pulled it  
20          up on the screen here. I just want to go to it in the  
21          patent.

22          THE COURT: I have in front of me the patent.

23          MR. QUISENBERRY: Okay. So Claim 21(d), first of  
24          all, there's nothing in the claim that says anything about a  
25          user doing anything. Okay? The way it starts out, it says

1 that a mobile user station provides two pieces of  
2 information to the computer station. First it provides the  
3 request, and then along with it it provides the geographic  
4 location of the mobile user station. And then the computer  
5 system takes that information and turns around and provides  
6 back to the mobile user station this information that we  
7 talk about here, "providing to said one of said mobile user  
8 stations information representative of selected portions of  
9 the map database and selected portions of the traffic  
10 information database."

11 And then the point is how does the computer system  
12 make that decision as to what information it's going to send  
13 back? The claim language says that it does it "based on  
14 said respective geographic location of said one of said  
15 mobile user stations."

16 So in terms of the hierarchy and relevance of the  
17 intrinsic record, here we are at the claim language, and it  
18 says nothing about a user doing anything. It very clearly  
19 explains how the process works, that the mobile user  
20 stations fires off these two pieces of information, the  
21 request, the geographic location, the computer system takes  
22 that and spits back to the mobile user station this  
23 information, the map and the traffic information, which is  
24 selected based upon the location of the mobile user station.

25 So I think that that explanation that comes

1 straight from the claim language is just at odds with what  
2 Google is saying.

3 THE COURT: Thank you.

4 "Vehicular movement." I'll start with Google.

5 MR. SHUNK: Your Honor, I'm not sure that we have  
6 a lot of complaint about the magistrate judge's  
7 construction, so long as it is understood that this use of  
8 the word "vehicles" implies multiple vehicles, again that  
9 that's not going to drop by the wayside. We use the phrase,  
10 "multiple vehicles traveling along the road," to emphasize  
11 the fact that vehicular movement was not the movement of an  
12 individual car. And I believe that the magistrate judge  
13 reached the same conclusion, saying, "the actual movement of  
14 vehicles along the road."

15 So I'm not sure that we're in disagreement, and I  
16 believe, Your Honor, at least I'm hearing a tentative  
17 conclusion from Your Honor that using the word "vehicles" in  
18 plural means multiple vehicles.

19 THE COURT: That's how I understand plurals to  
20 work.

21 What -- I may have missed something. What is  
22 added by the parenthetical sentence at the end of the  
23 Court's construction, if anything?

24 MR. SHUNK: I think -- obviously Judge Hubel would  
25 know the answer to that better than I do, but I suspect that

1 by the word "movement," he didn't find -- he wanted to  
2 describe a vector, not a point. Just knowing a specific  
3 point of a vehicle doesn't tell you anything about its  
4 movement, and I think that's why he included that phrase  
5 there.

6 THE COURT: Well, you say -- again, I'm not trying  
7 to get inside his head. We're talking about what his  
8 objective meaning is. If you say, "the actual movement of  
9 vehicles along the road," including velocity and change of  
10 position, but not just the position, what you mean is you  
11 can give velocity -- well, one meaning is you can give  
12 velocity, position and change of position. The other  
13 meaning is you can give velocity and change of position, but  
14 you do not include just position only, change of position.

15 Which of those two -- how do you read that? Which  
16 of those two?

17 MR. SHUNK: I guess I would read it as the latter,  
18 that velocity and change of position are aspects of  
19 vehicular movement, but simple position is not an aspect of  
20 vehicular movement. And I would agree with that.

21 THE COURT: And that's where you differ? You  
22 think "vehicular movement" includes concepts of velocity and  
23 change of position but also just position?

24 MR. QUISENBERRY: Correct.

25 THE COURT: So if there's a dead-stop traffic jam,

1 one of the information pieces about vehicular movement you  
2 contend is included within that language is that everybody  
3 is stopped?

4 MR. QUISENBERRY: Yes. I mean, that's what  
5 happens when it shows up red on your phone.

6 THE COURT: All right. Thank you all.

7 MR. SHUNK: Your Honor, can I respond to that,  
8 just that last point?

9 THE COURT: Whether movement includes position or  
10 only change in position?

11 MR. SHUNK: There can be zero velocity. That's  
12 different from reporting a point. And I think this is a  
13 critical issue to the case, because there may be some types  
14 of monitors, for example, or other devices that report  
15 simply the position at a specific time of a vehicle.

16 THE COURT: There can be zero velocity. Why can't  
17 there be zero movement?

18 MR. SHUNK: Well, zero velocity would be zero  
19 movement, but there's a difference between saying Tom Shunk  
20 is standing right now in the middle of the courtroom and  
21 he's not moving versus Tom Shunk is standing in the middle  
22 of the courtroom without information about what I'm doing  
23 the next second thereafter or the previous second.

24 THE COURT: Well, I'm interested in what the  
25 phrase "vehicular movement" includes, and you're

1     arguing that -- essentially you're arguing that to say  
2     there's no vehicular movement is not fairly included within  
3     the phrase "vehicular movement".

4             MR. SHUNK: No, actually, I would say that  
5     recording zero -- that zero velocity is reporting vehicular  
6     movement. It's reporting that there is currently no  
7     vehicular movement. But there's a difference between that  
8     and simply reporting the point where a thing is right now  
9     without information about -- in order to be stopped, you  
10    have to stop for some period of time, and if there's no  
11    period of time reported, just the coordinates of a  
12    particular vehicle at a particular point, you're not saying  
13    anything about whether it's stopped over a period of time or  
14    just there at that instant.

15            Maybe I'm not making myself clear.

16            THE COURT: No, I understand. I understand your  
17    distinction between position and movement.

18            And finally, you advocated for this all being  
19    detected by one or more traffic monitors?

20            MR. SHUNK: Yes, Your Honor.

21            THE COURT: Not monitors and mobile user stations?

22            MR. SHUNK: Yes, Your Honor. And we think, for  
23    the reasons explained in the briefing, that that's  
24    appropriate. That's the only way the phrase is used in the  
25    patent. It's in connection with what the traffic monitors

1 report.

2 THE COURT: Where do we find vehicular movement  
3 associated with mobile user stations? I'm sorry, I'm  
4 looking at you, but I didn't say that I was asking you a  
5 question. I'm looking for a claim language link between  
6 vehicular movement and mobile user stations.

7 MR. QUISENBERRY: I'm not sure that there is one.

8 THE COURT: Then why do you believe that vehicular  
9 movement shouldn't be limited to "as detected by one or more  
10 traffic monitors"?

11 (There is a pause in the proceedings.)

12 THE COURT: I'm going to give you a minute to  
13 think about that and turn here for just a second.

14 So are these two concepts linked, the idea that  
15 you cannot define vehicular movement in terms of position  
16 alone, and the idea that you gain information about  
17 vehicular movement only from traffic monitors? The reason  
18 I'm asking if they're linked is that whether traffic  
19 monitors are somehow, under the claim language, not capable  
20 of giving you position but only movement?

21 MR. SHUNK: I don't know that traffic monitors are  
22 incapable of giving --

23 THE COURT: I don't mean that technologically  
24 speaking. I mean that in terms of the way they're described  
25 in the patent. Do they only record and transmit movement



1 and not position?

2 MR. SHUNK: Well, Claim 1(a) -- and this is the  
3 only place "vehicular movement" is used in the claims, I  
4 believe -- says that the detector, which is part of the  
5 traffic monitor, provides a signal including data  
6 representative of vehicular movement.

7 So I believe that -- that's why I believe  
8 vehicular movement is very clearly linked in this patent to  
9 the detector of the traffic monitor. Traffic monitors  
10 detect vehicular movement.

11 THE COURT: All right. But they're not linked, in  
12 other words, linguistically in this patent? There's no way  
13 to understand vehicular movement not including position,  
14 just by knowing that it comes from stationary traffic  
15 monitors?

16 MR. SHUNK: I believe that's right, Your Honor.

17 THE COURT: That's not a very well-phrased  
18 question, but I think you get the idea that I was wondering  
19 whether there was a link that once we know they come from  
20 traffic monitors -- that is, vehicular movement data -- do  
21 we, of necessity, know that they cannot include position?  
22 And that doesn't appear to be the case. It's merely a  
23 linguistic concept, not an otherwise logical concept.

24 MR. SHUNK: I think I agree with that, Your Honor.

25 THE COURT: All right.

1 I was looking for whether vehicular movement is  
2 linked in the claim language anywhere to mobile user  
3 stations.

4 MR. QUISENBERRY: I don't believe that it is.

5 THE COURT: It's only here in Claim 1 where it's  
6 described, vehicular movement is described as coming from  
7 traffic monitors?

8 MR. QUISENBERRY: I believe that's correct.

9 THE COURT: All right. Thank you all very much.

10 I will get to you with my revisions. I've given  
11 you some tentative conclusions, and I don't intend to engage  
12 in lengthy reanalysis -- that's why we've had an hour and a  
13 half here -- and it will be for the reasons we've discussed  
14 here unless I engage in claim construction that we really  
15 haven't fully discussed here.

16 Anything further from Google?

17 MR. SHUNK: No. Thank you very much for your time  
18 here today.

19 THE COURT: Thank you both.

20 Anything further from Traffic?

21 MR. QUISENBERRY: There were just a couple of  
22 points that I didn't get to on vehicular movement. It's in  
23 the briefing.

24 THE COURT: Do you have -- I received from Google  
25 a copy of its PowerPoint slides on paper. Do you have that

1 with you?

2 MR. QUISENBERRY: Yes, I do.

3 THE COURT: Would you forward that to the Court?

4 MR. QUISENBERRY: Yes, I'd be happy to.

5 (Hanging.)

6 THE COURT: Wow, you win just by size. I mean, I  
7 look at that and I know who should win this case, right?

8 MR. QUISENBERRY: Well, there's a bunch in there  
9 from last time that we didn't touch on here, so --

10 THE COURT: I'll do my best to make what use I can  
11 of this.

12 Thank you all. Good day.

13 MR. QUISENBERRY: Thank you.

14 THE CLERK: This court is adjourned.

15 (Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

10/3/2011

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE